



## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Part 371

[Docket No. FMCSA-2022-0134]

#### Definitions of Broker and Bona Fide Agents

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

**ACTION:** Notification of interim guidance; request for comments.

**SUMMARY:** FMCSA is issuing this interim guidance to inform the public and regulated entities about FMCSA's interpretation of the definitions of "broker" and "bona fide agents" as it relates to all brokers of transportation by motor vehicle. FMCSA is taking this action to better define the terms in response to a mandate in the Infrastructure Investment and Jobs Act (IIJA). After consideration of public comments received, FMCSA is providing clarification on its interpretation of the definitions of "broker" and "bona fide agents," in addition to meeting other criteria required by the IIJA. While this interim guidance is effective immediately, FMCSA is also seeking comments in response to this interim guidance and may issue updated guidance if comments demonstrate a need.

**DATES:** *Effective date:* This updated guidance is effective [INSERT date of publication in the Federal Register].

*Comment date:* Comments must be received on or before [INSERT date 60 days after publication in the Federal Register].

**FOR FURTHER INFORMATION CONTACT:** Mr. Jeff Secrist, Registration, Licensing, and Insurance Division, Office of Registration and Safety Information, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, (202) 385-2367,

jeff.secrist@dot.gov. If you have questions on viewing or submitting material to the docket, contact Dockets Operations, (202) 366-9826.

## **SUPPLEMENTARY INFORMATION:**

### **I. PUBLIC PARTICIPATION AND REQUEST FOR COMMENTS**

#### **A. Request for Public Comments**

FMCSA requests public comment on its regulatory guidance and the factors the Agency will use in its interpretation of the definitions of “broker” and “bona fide agents.”

Docket: For access to the docket to read background documents or comments, go to [www.regulations.gov](http://www.regulations.gov) at any time or visit Room W12-140 on the ground level of the West Building, DOT, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments online.

Privacy: In accordance with 5 USC 553(c), DOT solicits comments from the public to better inform its guidance process. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

#### **B. Submitting Comments**

If you submit a comment, please include the docket number for this notice (FMCSA-2022-0134), indicate the specific section of this document to which your comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a

mailing address, an email address, or a phone number in the body of your document so FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to <https://www.regulations.gov/docket/FMCSA-2022-0134/document>, click on this notice, click “Comment,” and type your comment into the text box on the following screen.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

### **C. Confidential Business Information (CBI)**

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments to this notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to the notice, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission that constitutes CBI as “PROPIN” to indicate it contains proprietary information. FMCSA will treat such marked submissions as confidential under the Freedom of Information Act, and they will not be placed in the public docket for this notice. Submissions containing CBI should be sent to Mr. Brian Dahlin, Chief, Regulatory Evaluation Division, Office of Policy, FMCSA, 1200 New Jersey Avenue SE, Washington DC 20590-0001. Any comments FMCSA receives not specifically designated as CBI will be placed in the public docket for this proceeding.

### **D. Viewing Comments and Documents**

To view any documents mentioned as being available in the docket, go to <https://www.regulations.gov/docket/FMCSA-2022-0134/document> and choose the

document to review. To view comments, click this notice, then click “Browse Comments.” If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

## **E. Privacy Act**

In accordance with 49 U.S.C. 31315(b), DOT solicits comments from the public to better inform its decision-making process DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov). As described in the system of records notice DOT/ALL 14 –FDMS, which can be reviewed at <https://www.transportation.gov/privacy>, the comments are searchable by the name of the submitter.

## **II. BACKGROUND**

*Broker* is defined in 49 U.S.C. 13102(2) as a “person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.” It is also defined in 49 CFR 371.2(a) as a “person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.” In that same section, *bona fide agents* are defined as “persons who are part of the normal organization of a motor carrier

and perform duties under the carrier’s directions pursuant to a preexisting agreement which provides for a continuing relationship, precluding the exercise of discretion on the part of the agent in allocating traffic between the carrier and others.” 49 CFR 371.2(b).

On November 15, 2021, the President signed the IIJA into law (Pub .L. 117-58, 135 Stat. 429). Section 23021 of the IIJA<sup>1</sup> directed the Secretary (FMCSA) to issue guidance, within one year of the date of enactment of the IIJA, clarifying the definitions of the terms “broker” and “bona fide agents” in 49 CFR 371.2. The guidance must take into consideration the extent to which technology has changed the nature of freight brokerage, the role of bona fide agents, and other aspects of the freight transportation industry. Additionally, when issuing the guidance, FMCSA must, at a minimum: (1) examine the role of a dispatch service in the transportation industry; (2) examine the extent to which dispatch services could be considered brokers or bona fide agents; and (3) clarify the level of financial penalties for unauthorized brokerage activities under 49 U.S.C. 14916, applicable to a dispatch service.<sup>2</sup>

In an effort to obtain and consider stakeholder input in the development of its guidance, FMCSA issued a Federal Register notice on June 10, 2022, seeking comment in 13 specific areas. 87 FR 35593.

#### *STAKEHOLDER COMMENTS*

FMCSA appreciates the robust response to our request for comment. Over 80 stakeholders filed comments in the public docket, including individuals, trade associations, brokers, and dispatch services.<sup>3</sup> While the Agency does not specifically

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<sup>1</sup> The full text is available at [congress.gov/117/plaws/publ58/PLAW-117publ58.pdf](https://congress.gov/117/plaws/publ58/PLAW-117publ58.pdf).

<sup>2</sup> Due to a statutory omission, FMCSA is unable to assess civil penalties for violations of 49 U.S.C. 14916 and may pursue such penalties only through the Department of Justice in federal court. Congress has indicated interest in FMCSA’s statutory authority in a recent House Appropriations Committee Report.

<sup>3</sup> FMCSA appreciates commenters that provided submissions by the July 11 deadline for comment submission. A number of commenters submitted comments after the deadline. While FMCSA reminds stakeholders of the importance of submitting timely comments, in this particular proceeding, FMCSA will consider the late-filed comments in the interest of developing a complete record. While FMCSA accepted the comments in this proceeding, it may not consider late-filed comments in future proceedings.

reference all comments in this guidance, the Agency would like to assure stakeholders it has reviewed and considered all comments filed.

### **III. COMPLIANCE WITH THE IIJA**

#### *A. TECHNOLOGY*

As an initial matter, commenters were nearly unanimous that while technology has changed freight brokerage, such changes have not affected the fundamental nature of freight brokerage, nor are they relevant for the issuance of this guidance.<sup>4</sup> One commenter did note that the technological changes have exacerbated fraud problems.<sup>5</sup> Accordingly, while the Agency recognizes that brokerage has changed immeasurably due to technology, including moving from a phone based system to one based on the internet, such changes do not impact the fundamental nature of brokerage, which involves arranging transportation for compensation, and hence do not have a significant impact on this guidance.

#### *B. BONA FIDE AGENTS*

Stakeholders provided FMCSA with useful information on the role of bona fide agents. Commenters have described bona fide agents as advocates or a sales force for a single motor carrier,<sup>6</sup> an outside sales force that acquires freight for an employer,<sup>7</sup> a dispatch service used in lieu of motor carrier employees,<sup>8</sup> people who look for freight for a motor carrier,<sup>9</sup> a service that allows motor carriers to outsource

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<sup>4</sup> See comments of Truckstop.com, at 5; Mode Transportation (Mode), at 8; Transportation Intermediaries Association (TIA), at 10; National Industrial Transportation League (NITL), at 2; Small business in Transportation Coalition (SBTC), at 14; England Logistics (England), at 8; and Uship, at 3.

<sup>5</sup> See Comments of 13 stakeholders (13 Stakeholder comments), at 12-13. The 13 stakeholders include the Air & Expedited Motor Carriers Association, Airforwarders Association, Alliance for Safe, Efficient, and Competitive Truck Transportation (ASECTT), Auto Haulers Association of America, American Home Furnishings Alliance, Apex Capital Corp, National Association of Small Trucking Companies (NASTC), PFA Transportation Insurance & Surety Services, Sompo International, Transportation & Logistics Council, Specialized Furniture Carriers, The Expedite Association of North America, Transportation Loss Prevention and Security Association.

<sup>6</sup> See Mode comments, at 7.

<sup>7</sup> See comment of AWM Associates, LLC (AWM), at 4.

<sup>8</sup> See TIA comments, at 9.

<sup>9</sup> See comments of the Owner-Operator Independent Drivers Association (OOIDA), at 5.

operations instead of having employees handle them,<sup>10</sup> a sales force from acquired motor carriers that big motor carriers use,<sup>11</sup> and an operation where people work for one motor carrier and have no discretion to allocate traffic.<sup>12</sup> Based upon stakeholder comments, it appears that bona fide agents are generally considered individuals/entities that solicit business for a motor carrier.

### *C. OTHER ASPECTS OF THE FREIGHT TRANSPORTATION INDUSTRY*

Finally, stakeholders provided input, albeit more limited, on other aspects of the freight transportation industry. A broker indicated that other aspects of the transportation industry do not need to be considered.<sup>13</sup> A managing general agency and program administrator for insurance companies focused on transportation indicated that FMCSA should issue guidance that is consistent with the Motor Carrier Safety Improvement Act of 1999 and the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21).<sup>14</sup> A truck safety advocacy group indicated that FMCSA must issue a clear definition of broker that enables enforcement.<sup>15</sup> And, a coalition of stakeholders noted the significant ramifications of being considered a broker or not.<sup>16</sup>

While stakeholders did not provide FMCSA with specific information related to the requirement that the Agency must consider “other aspects of the freight transportation industry” in issuing the guidance, FMCSA recognizes that its guidance is operating in a broader context and has impacts beyond the immediate focus of this guidance. In today’s notice, FMCSA has worked to avoid creating unintended consequences, in issuing guidance on its interpretation of its regulations and related matters. While guidance may be relevant to stakeholder compliance with FMCSA’s regulations, any changes to

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<sup>10</sup> See comments of the Intermodal Association of North America (IANA), at 5.

<sup>11</sup> See 13 Stakeholder comments, at 10-11.

<sup>12</sup> See comments of the American Trucking Associations Moving and Storage Conference (MSC), at 5.

<sup>13</sup> See comments of Mode, at 8.

<sup>14</sup> See comments of Greenwich Transportation Underwriters, at 2.

<sup>15</sup> See comments of the Truck Safety Coalition (TSC), at 3. FMCSA reminds stakeholders that guidance is not enforceable, in contrast to statutes and regulations, which are.

<sup>16</sup> See 13 Stakeholder comments, at 4-6.

FMCSA's regulations and hence compliance responsibilities would need to be enacted in a separate rulemaking proceeding.<sup>17</sup>

#### **IV. INTERIM GUIDANCE**

With the aforementioned consideration of factors as background, FMCSA now turns to the core IIJA mandate: the issuance of guidance pertaining to the definition of broker and bona fide agents, the examination of the role of dispatch services in the transportation industry, the extent to which dispatch services could be considered brokers or bona fide agents, and the level of financial penalties for unauthorized brokerage activities under 49 U.S.C. 14916 applicable to a dispatch service. This document does not have the force and effect of law and is not meant to bind the public in any way, and the document is intended only to provide information to the public regarding existing requirements under the law or agency policies

##### *A. DEFINITION OF BROKER*

While FMCSA is unable to change the definition of "broker" absent a rulemaking, it is able to provide clarification here. As an initial matter, there was a split amongst stakeholders on whether the current definition of broker was adequate. A majority of stakeholders believed that the current definition of broker was adequate,<sup>18</sup> while others proposed some changes. A safety advocacy group recommended amendment of the definition of "broker."<sup>19</sup> A stakeholder representing the household goods (HHG) motor carrier industry asked FMCSA to clarify that merely selling leads

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<sup>17</sup> FMCSA notes and appreciates SBTC's Petition for rulemaking regarding the definition of "dispatcher." As noted in its response to SBTC, FMCSA is continuing to review SBTC's petition. Today's notice is not to be interpreted as a decision on SBTC's petition. Other stakeholders are free to file petitions for rulemaking related to the issues covered in today's notice as well.

<sup>18</sup> See comments of Mode, at 3-4; TIA, at 3; OOIDA, at 2; NITL, at 2; IANA, at 2; MSC, at 2-3; Agricultural and Food Transporters Conference of ATA and multiple state trucking associations (AFTC), at 2; 13 Stakeholder comments, at 4; Larry Walker.

<sup>19</sup> TSC comments, at 2. In order for FMCSA to consider such a change, TSC would need to file a petition for rulemaking,



does not require an entity to obtain broker authority.<sup>20</sup> One broker believed that FMCSA should amend the definition of “broker” to comport with changes in MAP-21 that required motor carriers and hence their agents to obtain broker operating authority.<sup>21</sup> Additionally, internet based load matching services have requested that FMCSA consider electronic load boards to not be considered brokers.<sup>22</sup>

Given the prevailing view among commenters that the current definition of “broker” is adequate, the Agency feels the need to clarify it in only one area: the relevance of an entity’s handling of funds in a transaction between shippers and motor carrier. FMCSA appreciates the robust input it received on this issue. Some commenters believed that whether one handles funds is irrelevant to whether one is a broker.<sup>23</sup> A coalition of stakeholders believed the handling of money is not determinative in the broker determination.<sup>24</sup> Other stakeholders felt that the handling of money had at least some relevance as to whether one is brokering.<sup>25</sup>

After consideration of the stakeholder comments and the important role of financial responsibility in broker regulation,<sup>26</sup> FMCSA wishes to clarify that handling

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<sup>20</sup> See comments of MSC, at 4. FMCSA appreciates MSC’s comments and recognizes that they have raised the issue with the Agency for quite some time. In order to give stakeholders a chance to comment in this area, FMCSA will treat MSC’s comments as a request for guidance on the definition of HHG broker and issue guidance in a separate proceeding.

<sup>21</sup> See Comments of England, at 1-4. FMCSA recognizes this issue but does not believe that this is the appropriate forum to resolve it. England would need to file a petition for rulemaking with the Agency for a change in the definition of “broker.” However, as England notes, Congress did not change the definition of “broker” in 49 USC 13102(2). In order for FMCSA to change the definition of broker in its regulations as England suggests, the Agency would have to carefully consider its authority to make such a change given that Congress specifically left the prior definition of “broker” in place in MAP-21.

<sup>22</sup> See comments of DAT, at 1; Truckstop.com, at 1-5; and Uship, at 4. Comments filed by representatives of the HHG motor carrier industry do not believe a carveout from the broker definition for load boards is appropriate. See comments of Unigroup/Mayflower/MoveRescue, at 3. While whether an entity requires broker operating authority must be determined on a case by case basis, FMCSA does not believe that where entities merely host an electronic platform for shippers and motor carriers to connect directly that broker operating authority registration is required. This position is consistent with a 2000 letter from FMCSA that has been placed in the docket. See Letter from Judith Rutledge, FMCSA Acting Chief Counsel, to Andrew K. Light, Esq.

<sup>23</sup> See comments of SBTC, at 6; England, at 5; TSC, at 2.

<sup>24</sup> See 13 Stakeholder comments, at 6-7.

<sup>25</sup> See comments of TIA, at 7; OOIDA, at 4; MSC, at 4; Cox Automotive, at 1-2.

<sup>26</sup> One of the most significant broker regulations is the requirement that brokers have a \$75,000 bond or trust fund to protect motor carriers from non-payment. Where a shipper pays a fee to third party that then takes a profit and remits the balance to a motor carrier, the third party is clearly required to have broker

money exchanged between shippers and motor carriers is a factor that strongly suggests the need for broker authority, but it is not an absolute requirement for one to be considered a broker.

#### *B. DEFINITION OF BONA FIDE AGENT*

Next, FMCSA is mandated to clarify the definition of “bona fide agents” in 49 CFR 371.2. Stakeholders provided feedback on this point. A HHG motor carrier trade association thought the current definition was “clear as to what entities fall within that term.”<sup>27</sup> A broker indicated that the definition should be eliminated due to MAP-21 requiring motor carriers, and hence their agents, to have broker authority.<sup>28</sup> And multiple entities believe that in order to be deemed a “bona fide agent” one can represent only one motor carrier.<sup>29</sup>

After careful consideration, FMCSA has determined that representing more than one motor carrier does not necessarily mean one is a broker rather than a bona fide agent. Any determination will be highly fact specific and will entail determining whether the person or company is engaged in the allocation of traffic between motor carriers.

#### *C. ROLE OF DISPATCH SERVICES*

Next, the IIJA required the agency to examine the role of dispatch services in the transportation industry and the extent to which such services could be considered brokers or bona fide agents.

Stakeholder comments make clear that there is no universally accepted definition of “dispatch service,” nor did Congress define the term in the IIJA provision mandating this guidance.<sup>30</sup> One broker trade association characterized it as a vague term,<sup>31</sup> while

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authority. FMCSA will soon be issuing a Notice of Proposed Rulemaking on broker and freight forwarder financial responsibility, which will further clarify related duties.

<sup>27</sup> See comments of the MSC, at 5.

<sup>28</sup> See comments of England, at 1-4. As noted above, any such change would require rulemaking in accordance with the APA and statutory authority concerns would need to be addressed.

<sup>29</sup> See comments of TIA, at 8; NITL, at 2; SBTC, at 9.

<sup>30</sup> See comments of England, at 5-7.

<sup>31</sup> See TIA comments, at 7.

a coalition of stakeholders said it is an invented term.<sup>32</sup> According to a self-identified dispatch service, dispatchers represent motor carriers, they don't connect shippers and motor carriers, they don't handle money, but they do provide carrier support services.<sup>33</sup> Additional commenters stated that dispatchers perform back office operations for motor carriers;<sup>34</sup> they book freight and perform other tasks;<sup>35</sup> they perform many administrative duties and basic accounting for small carriers;<sup>36</sup> and they are paid a percentage of the freight charges from a motor carrier.<sup>37</sup> Other stakeholders indicate that dispatch services find loads for motor carriers, handle administrative tasks and assist with compliance,<sup>38</sup> source shipments, and allocate shipments between motor carriers.<sup>39</sup> According to a shipper trade association, dispatch services would be expected to be like an in-house truck dispatcher, but in reality many are operating more like brokers.<sup>40</sup> A broker commenter indicated that dispatch services have multiple motor carriers in their client base, they seek freight and obtain freight for motor carriers, and they are paid by motor carriers.<sup>41</sup>

After consideration of the public comments, while it is clear that there is no commonly accepted definition of a dispatch service, such services appear to have certain common features. First, they work exclusively for motor carriers, not for shippers. Second, they source loads for motor carriers. And third, they perform additional services for motor carriers that are unrelated to sourcing shipments.

#### *D. DISPATCH SERVICE: BROKER OR BONA FIDE AGENT*

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<sup>32</sup> See 13 stakeholder comments, at 7.

<sup>33</sup> See comments of Seeley & Sylvester, LLC, at 2-4; See also comments of A1 Express, at 2 (stating that dispatch services "are and should be a carrier support service.") Note that a number of individuals submitted identical comments which are cited as A1 Express.

<sup>34</sup> See Mode comments, at 5; See also comments from Shelley Smith (stating that "a dispatcher should be categorized as a back office assistant because that is truly a power dispatcher.").

<sup>35</sup> See comments of Quality Dispatching, at 5.

<sup>36</sup> See comments of WCF Freight Transport.

<sup>37</sup> See comments of AWM Associates LLC, at 2.

<sup>38</sup> See comments of OOIDA, at 4.

<sup>39</sup> See comments of IANA, at 3-4.

<sup>40</sup> See comments of the Transportation and Logistics Council, Inc., at 2.

<sup>41</sup> See comments of England, at 5-7.

Further, the IIJA mandated that FMCSA examine when a dispatch service could be considered a broker and when it could be considered a bona fide agent. Stakeholders provided significant input on these points.

A trade association indicated that when a dispatch service represents one motor carrier it is a bona fide agent, but when it represents more than one it is a broker.<sup>42</sup> A broker thought that when a dispatch service only performed back office operations, it was not a broker, but if it arranges loads it is.<sup>43</sup> A dispatch service indicated that dispatch services are bona fide agents, as they are merely agents to locate freight and are paid a flat fee or a percentage.<sup>44</sup> Another dispatch service also believes that a dispatch service is a bona fide agent and not a broker because dispatch services do not connect shippers with carriers that can transport their loads, and therefore do not meet the broker business model.<sup>45</sup> A consulting firm believes that dispatch services are bona fide agents if they are employees per IRS regulations, but not if they represent more than one motor carrier.<sup>46</sup> Several trade organizations believe that if a dispatch service represents more than one motor carrier it is a broker, and that the handling of funds warrants a finding of brokerage.<sup>47</sup> A coalition of 13 stakeholders believes that representing more than one motor carrier renders a dispatch service a broker, and a broker believes that representing more than one motor carrier takes one outside of the definition of “bona fide agent.”<sup>48</sup> Finally, a dispatch service indicated that broker authority should be required only when arranging transportation on behalf of shippers.<sup>49</sup>

After careful consideration, FMCSA clarifies that when a dispatch service does not participate in the arrangement of freight, or when it represents only one motor carrier,

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<sup>42</sup> See comments of IANA, at 4.

<sup>43</sup> See comments of Mode, at 5.

<sup>44</sup> See comments of Quality Dispatching, at 4-5.

<sup>45</sup> See comments of A1 Express, at 2.

<sup>46</sup> See comments of AWM, at 4.

<sup>47</sup> See comments of TIA, at 7; and OOIDA, at 4.

<sup>48</sup> See comments of 13 stakeholders, at 10; England, at 8.

<sup>49</sup> See comments of Seeley & Sylvester LLC, at 4.

it is not a broker. If a dispatch service arranges transportation on behalf of multiple motor carriers and engages in the allocation of traffic, however, then pursuant to 49 CFR 371.2, it is not a bona fide agent and must obtain broker operating authority registration. Ultimately, the analysis of whether a person or entity requires broker authority is often highly fact specific and must be made on a case-by-case basis.

Regarding whether a dispatch service is a bona fide agent, one must analyze whether the service falls within the definition of bona fide agent in 49 CFR 371.2(b). However, if the dispatch service allocates traffic between two motor carriers, it cannot be a bona fide agent by definition.

#### *E. DISPATCH SERVICES THAT WOULD NOT REQUIRE BROKER AUTHORITY*

Generally, the factors relevant to whether a dispatch service is not required to obtain broker authority are stated below:

- (1) The dispatch service has a written legal contractual relationship with a motor carrier that clearly reflects the motor carrier is appointing the dispatch service as a licensed agent for the motor carrier. This is often a long-term contractual relationship;
- (2) The written legal contract specifies the insurance and liability responsibilities of the dispatch service and motor carrier. The dispatch service must also meet all state licensing requirements;
- (3) The dispatch service goes through a broker to arrange for the transportation of shipments for the motor carrier. The dispatch service may not seek or solicit shippers for freight;
- (4) The dispatch service does not provide billing nor accept compensation from the broker, 3PL (third-party logistics company), or factoring company, but instead receives compensation from the motor carrier(s) based on the pre-determined written legal contractual agreement;

- (5) The dispatch service is not an intermediary or involved in the financial transaction between a broker and motor carrier;
- (6) The dispatch service is an IRS 1099 recipient from the motor carrier, or a W2 employee of the motor carrier as specified in the legal written contract agreement;
- (7) The dispatch service discloses that they are a dispatch service operating under the authority of a specific motor carrier, and the shipment is arranged for that motor carrier only;
- (8) The dispatch service does not subsequently assign or arrange for the load to be carried/moved by another motor carrier; or
- (9) A dispatch service does not provide their “services” for a motor carrier unless that motor carrier specifically appointed the dispatch service as their agent in accordance with the aforementioned requirements.

*F. DISPATCH SERVICES THAT REQUIRE BROKER AUTHORITY*

The following factors would indicate the dispatch service should obtain broker authority:

- (1) The dispatch service interacts or negotiates a shipment of freight directly with the shipper, or a representative of the shipper;
- (2) The dispatch service accepts or takes compensation for a load from the broker, or factoring company, or is involved in any part of the monetary transaction between any of those entities;
- (3) The dispatch service arranges for a shipment of freight for a motor carrier, with which there is no written legal contract with the motor carrier that meets the aforementioned criteria;
- (4) The dispatch service accepts a shipment without a truck/carrier, then attempts to find a truck/carrier to move the shipment;
- (5) The dispatch service is a named party on the shipping contract; or

(6) The dispatch service is soliciting to the open market of carriers for the purposes of transporting a freight shipment.

It is clear based on feedback from industry that there is a need and desire for dispatch services, among large and small motor carriers. A beneficial role that a dispatch service may provide is the outsourcing of resources for small motor carriers who cannot afford a full-time employee to perform these functions. The dispatch service can help to ensure the motor carrier has a steady stream of shipments while allowing the motor carrier to focus on its core business of safely transporting freight. FMCSA does not believe it is the intent of Congress to eliminate the services that dispatch services provide.

While no single factor is paramount in assessing the business relationship between a dispatch service and a motor carrier, the extent of a motor carrier's control over the individual(s) performing the dispatch services is highly significant, i.e., the dispatch service works on behalf of the motor carrier and makes decisions based on the motor carrier's guidance and direction. As noted, FMCSA determines whether a dispatcher is conducting broker operations on a case-by-case basis, utilizing factors including those above.

#### *G. FINANCIAL PENALTIES*

Finally, FMCSA must clarify the level of penalties for unauthorized brokerage applicable to dispatch services. Such an assessment is straightforward. If the dispatch service is deemed to be providing unauthorized brokerage services pursuant to 49 U.S.C. 14916, the service will be subject to applicable penalties<sup>50</sup>. If no finding of unauthorized brokerage is made, it will not be subject to such penalties.

### **V. REQUEST FOR PUBLIC COMMENT**

FMCSA requests public comment on its regulatory guidance and the factors the Agency will use in its interpretation of the definitions of “broker” and “bona fide agent.”

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<sup>50</sup> Penalties for violations of section 14916 are provided in 49 U.S.C. 14916(c)(1),(d).

The Agency welcomes comments from stakeholders that are relevant to identifying a dispatch service that engages in actions that would require broker authority compared with actions that don't require broker authority. Additionally, FMCSA welcomes comments concerning the potential impact of this guidance on dispatch services upon which the broker rules would be considered applicable.

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Robin Hutcheson  
Administrator

[FR Doc. 2022-24923 Filed: 11/15/2022 8:45 am; Publication Date: 11/16/2022]